The Supreme Court of South Carolina

In the Matter of W. James Hoffmeyer, Respondent.

ORDER

On January 22, 2008, respondent was definitely suspended from the practice of law for nine (9) months. In the Matter of Hoffmeyer, Op. No. 26422 (S.C. Sup. Ct. filed January 22, 2008) (Shearouse Adv. Sh. No. 3 at 36). The Office of Disciplinary Counsel requests the Court appoint an attorney to protect respondent's clients' interests pursuant to rule 31, RLDE, Rule 413, SCACR.

IT IS HEREBY ORDERED that J. David Banner, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Banner shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Banner may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and

any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that J. David Banner, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that J. David Banner, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Banner's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina
January 23, 2008

The Supreme Court of South Carolina

In the Matter of Jeffrey A. Jacobson, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 9, 1977, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Supreme Court, dated December 27, 2007, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Jeffrey A. Jacobson shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

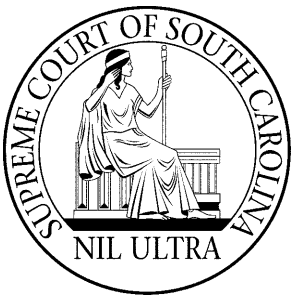
s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Columbia, South Carolina

January 25, 2008



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 4

January 28, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

Page

None

UNPUBLISHED OPINIONS

None

PETITIONS FOR REHEARING

4316-Lynch v. Toys "R" Us, Inc.	Pending
4324-Hall v. Desert Aire, Inc.	Pending
4325-Dixie Belle v. Redd et al.	Pending
4327-State v. Odom	Pending
2007-UP-467-State v. N. Perry	Pending
2007-UP-549-Frierson v. InTown Suites	Pending
2007-UP-556-RV Resort & Yacht v. BillyBob's Marine	Pending

PETITIONS – SOUTH CAROLINA SUPREME COURT

4128 – Shealy v. Doe	Pending
4143 – State v. K. Navy	Pending
4159--State v. T. Curry	Pending
4189—State v. T. Claypoole	Pending
4195—D. Rhoad v. State	Pending
4198--Vestry v. Orkin Exterminating	Pending
4209-Moore v. Weinberg	Pending
4211-State v. C. Govan	Pending

4213-State v. D. Edwards	Pending
4220-Jamison v. Ford Motor	Pending
4224-Gissel v. Hart	Pending
4227-Forrest v. A.S. Price et al.	Pending
4233-State v. W. Fairey	Pending
4235-Collins Holding v. DeFibaugh	Pending
4237-State v. Rebecca Lee-Grigg	Pending
4238-Hopper v. Terry Hunt Const.	Pending
4239-State v. Dicapua	Pending
4240-BAGE v. Southeastern Roofing	Pending
4242-State v. T. Kinard	Pending
4243-Williamson v. Middleton	Pending
4244-State v. O. Gentile	Pending
4245-Sheppard v. Justin Enterprises	Pending
4247-State v. Larry Moore	Pending
4251-State v. Braxton Bell	Pending
4256-Shuler v. Tri-County Electric	Pending
4258-Plott v. Justin Ent. et al.	Pending
4259-State v. J. Avery	Pending
4261-State v. J. Edwards	Pending
4262-Town of Iva v. Holley	Pending

4264-Law Firm of Paul L. Erickson v. Boykin	Pending
4265-Osterneck v. Osterneck	Pending
4267-State v. Terry Davis	Pending
4270-State v. J. Ward	Pending
4271-Mid-South Mngt. v. Sherwood Dev.	Pending
4272-Hilton Head Plantation v. Donald	Pending
4274-Bradley v. Doe	Pending
4275-Neal v. Brown and SCDHEC	Pending
4276-McCrosson v. Tanenbaum	Pending
4277-In the matter of Kenneth J. White	Pending
4279-Linda Mc Co. Inc. v. Shore	Pending
4284-Nash v. Tindall	Pending
4286-R. Brown v. D. Brown	Pending
4289-Floyd v. Morgan	Pending
4291-Robbins v. Walgreens	Pending
4302-Hiott v. State	Pending
2006-UP-222-State v. T. Lilly	Pending
2006-UP-304-Bethards v. Parex	Pending
2006-UP-315-Thomas Construction v. Rocketship Prop.	Pending
2006-UP-320-McConnell v. John Burry	Pending
2006-UP-350-State v. M. Harrison	Pending
2006-UP-413-Rhodes v. Eadon	Pending

2007-UP-052-State v. S. Frazier	Pending
2007-UP-054-Galbreath-Jenkins v. Jenkins	Pending
2007-UP-061-J. H. Seale & Son v. Munn	Pending
2007-UP-064-Amerson v. Ervin (Newsome)	Pending
2007-UP-066-Computer Products Inc. v. JEM Rest.	Pending
2007-UP-090-Pappas v. Ollie's Seafood	Pending
2007-UP-091-Sundown Operating v. Intedge	Pending
2007-UP-128-BB&T v. Kerns	Pending
2007-UP-133-Thompson v. Russell	Pending
2007-UP-147-Simpson v. Simpson	Pending
2007-UP-151-Lamar Florida v. Li'l Cricket	Pending
2007-UP-172-Austin v. Town of Hilton Head	Pending
2007-UP-177-State v. H. Ellison	Pending
2007-UP-183-State v. Hernandez, Guerrero, Arjona	Pending
2007-UP-187-Salters v. Palmetto Health	Pending
2007-UP-199-CompTrust AGC v. Whitaker's	Pending
2007-UP-202-L. Young v. E. Lock	Pending
2007-UP-226-R. Butler v. SC Dept. of Education	Pending
2007-UP-243-E. Jones v. SCDSS	Pending
2007-UP-249-J. Tedder v. Dixie Lawn Service	Pending
2007-UP-252-Buffington v. T.O.E. Enterprises	Pending

2007-UP-255-Marvin v. Pritchett	Pending
2007-UP-266-State v. Dator	Pending
2007-UP-272-Mortgage Electronic v. Suite	Pending
2007-UP-316-Williams v. Gould	Pending
2007-UP-318-State v. Shawn Wiles	Pending
2007-UP-329-Estate of Watson v. Babb	Pending
2007-UP-331-Washington v. Wright Const.	Pending
2007-UP-337-SCDSS v. Sharon W.	Pending
2007-UP-340-O'Neal v. Pearson	Pending
2007-UP-341-Auto Owners v. Pittman	Pending
2007-UP-350-Alford v. Tamsberg	Pending
2007-UP-351-Eldridge v. SC Dep't of Transportation	Pending
2007-UP-354-Brunson v. Brunson	Pending
2007-UP-358-Ayers v. Freeman	Pending
2007-UP-384-Miller v. Unity Group, Inc.	Pending
2007-UP-403-SCDSS v. C.H. Doe	Pending
2007-UP-412-Hall v. State	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Ricky Rainwater, Appellant.

Appeal From Lexington County
Clyde N. Davis, Jr., Special Circuit Court Judge

Opinion No. 26423
Heard December 4, 2007 – Filed January 28, 2008

AFFIRMED

Harry T. Heizer, of Irmo, for Appellant.

Charles Hillard Sheppard, Jr., and Rachel Donald Erwin, both of Blythewood, for Respondent.

JUSTICE BEATTY: Ricky Rainwater appeals the circuit court's order finding an arresting officer could prosecute his driving under the influence (D.U.I.) case after the officer transferred to another law enforcement agency. We affirm.

FACTS

On August 19, 2001, Trooper Jason Stoner, with the South Carolina Highway Patrol, stopped Ricky Rainwater in Lexington County and charged him with D.U.I. Stoner later left the Highway Patrol and accepted employment with the Lexington County Sheriff's Department. Rainwater's case was called for trial on June 18, 2003, and Deputy Stoner appeared to prosecute the case. Prior to trial and prior to empaneling the jury, Rainwater's attorney moved to disqualify Deputy Stoner from prosecuting the case because he was no longer with the Highway Patrol. Deputy Stoner asked the magistrate whether he could call his former supervisor from the Highway Patrol to handle the matter, and the magistrate denied the request. The magistrate directed the verdict for Rainwater.[1]

The State filed a motion entitled, "Motion for New Trial," arguing that it was error to dismiss the case because, although Stoner was no longer with the Highway Patrol, he could still prosecute the case as the *arresting officer*. In the alternative, the State argued Stoner's former supervisor from the Highway Patrol could have prosecuted the case. The State requested that the magistrate reconsider the matter and remand the case for trial. After a hearing, the magistrate denied the motion, and the State filed a Notice of Appeal with the circuit court.

Both parties eventually participated in a hearing before Judge Clyde N. Davis on June 29, 2006. After the hearing, Judge Davis reversed and remanded the matter to the magistrate court for trial. Specifically, Judge Davis held the magistrate: (1) erred in dismissing the case because Stoner

[1] Rainwater asserts the magistrate actually just dismissed the case, and there is evidence at trial that Rainwater believed the case was dismissed. However, the oral pronouncement and the written return both state that the magistrate was granting a directed verdict. It would be improper for the magistrate to grant a "directed verdict" based on the insufficiency of the evidence when no evidence had yet been presented. Accordingly, we interpret the magistrate's order as one of dismissal.

was an arresting officer and could have prosecuted the case; (2) erred in dismissing the case or directing a verdict prior to the swearing of the jury or presentation of evidence; and (3) could have granted a continuance to Stoner, despite his failure to use the word "continuance," because it was obvious what Stoner was requesting and having a supervisor there would allow the case to proceed. Rainwater appeals.

DISCUSSION

Rainwater argues that the rule allowing police officers to prosecute magistrate level cases should be narrowly construed to mean that an officer of one agency may not assist another agency in the prosecution of the case. We disagree.

Three cases deal with the practice of officers prosecuting magistrate level cases. In State v. Messervy, 258 S.C. 110, 187 S.E.2d 524 (1972), this Court noted the impracticability of having prosecuting attorneys present the State's case in the voluminous number of traffic court cases, and it upheld the common law practice of allowing arresting officers to act as prosecutors at the summary court level. Messervy, 258 S.C. at 113, 187 S.E.2d at 525. The Court noted that the officer's actions would be subject to the magistrate's scrutiny to ensure proper conduct. Id. In State ex rel McLeod v. Seaborn, 270 S.C. 696, 244 S.E.2d 317 (1978), the Court held the "prosecution of misdemeanor traffic violations in the magistrates' courts by either the arresting officer or a supervisory officer assisting the arresting officer does not constitute the unlawful practice of law. . . ." Seaborn, 270 S.C. at 699, 244 S.E.2d at 319.

More recently, this Court declined to extend the holdings in Messervy and Seaborn. In State v. Sossamon, 298 S.C. 72, 378 S.E.2d 259 (1989), a State Highway Patrol trooper appeared at the scene where county sheriff's deputies were arresting the Sossamons for D.U.I. and violating the open container law. The trooper prosecuted the case, and this Court reversed the circuit court's affirmance of the conviction. Noting that it is practical to allow an arresting officer to prosecute magistrate level traffic offenses and to allow a supervisor to assist arresting officers, the Court found it was error to

allow the trooper to prosecute the case because he was neither the arresting officer nor the supervisor of the arresting officers. The Court limited the practice of allowing an officer to act as a prosecutor to the arresting officer and his supervisor. Sossamon, 298 S.C. at 73, 378 S.E.2d at 260.

The Sossamon court did not distinguish between the agencies, but it focused on the fact that the trooper prosecuting the case was neither an arresting officer nor a supervisor of the arresting officer. By contrast, Deputy Stoner was the arresting officer and the person able to testify regarding the events surrounding the arrest. Regardless of Deputy Stoner's decision to change law enforcement agencies, we find it was appropriate for him to prosecute the matter. Thus, we find the circuit court correctly interpreted Sossamon as allowing Deputy Stoner to prosecute the D.U.I. Further, because Deputy Stoner was qualified to prosecute the D.U.I. case, and the magistrate's decision to dismiss the matter caught the State by surprise, it was an abuse of discretion for the magistrate to deny Stoner's obvious request for a continuance in order to obtain an alternate person to prosecute. See Morris v. State, 371 S.C. 278, 283, 639 S.E.2d 53, 56 (2006) (noting that although the reversal of the denial of a continuance is rare, it was clearly an abuse of discretion to deny the continuance because it resulted in prejudice to the appellant).

Accordingly, we find the circuit court was correct in its decision to reverse the magistrate's grant of relief and remand the matter to the magistrate for trial.

AFFIRMED.

TOAL, C.J., MOORE, WALLER and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Luzenski A. Cottrell, Appellant.

Appeal from Horry County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 26424
Heard September 18, 2007 – Filed January 28, 2008

REVERSED IN PART

Chief Appellate Defender Joseph L. Savitz, III, and Appellate Defender Kathrine H. Hudgins, both of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, and John Gregory Hembree, of Conway, for Respondent.

JUSTICE PLEICONES: Appellant was convicted of murder, assault with intent to kill, resisting arrest with a deadly weapon, and grand larceny. He

received a death sentence for murder, the jury finding two statutory aggravating factors[1] and concurrent ten year sentences on the remaining three charges. On appeal, he contends[2] the trial court erred in refusing appellant's request that the jury be charged voluntary manslaughter as a lesser offense of murder. We agree, reverse appellant's murder conviction and death sentence, and remand for further proceedings.

ISSUE

Whether the evidence, viewed in the light most favorable to appellant, entitled him to a charge on voluntary manslaughter?

FACTS/ANALYSIS

"Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000). In determining whether voluntary manslaughter should be charged as a lesser offense of murder, the court must view the evidence in the light most favorable to the defendant. The charge need not be given "where it clearly appears that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007) (internal citation omitted). We therefore review the evidence in the light most favorable to appellant, mindful that the charge request is properly rejected only where "there is no evidence whatsoever" of the lesser offense.

Shortly after midnight on December 29, two automobiles pulled into a Dunkin Donuts parking lot in Myrtle Beach. Fred Halcomb was driving one

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[1] (1) Knowingly creating a great risk of death to more than one person and (2) murdering a police officer during the performance of his official duties. S.C. Code Ann. § 16-3-20(c)(3) and (7) (2003 and Supp. 2006).

[2] Appellant's second argument, which he conceded at oral argument is irrelevant to the merits of his appeal, is affirmed pursuant to Rule 220(b)(1), SCACR, and State v. Bell, 374 S.C. 136, 646 S.E.2d 888 (Ct. App. 2007).

car, which contained a single passenger, his girlfriend Dianne. Donnie Morgan was driving the second car; in the front passenger's seat was Donnie's fiancée, sitting behind her was appellant, and beside him in the back seat his girlfriend, Amber Counts. At the store, appellant, Fred, and Dianne went in while Donnie, Amber, and Donnie's fiancée stayed in Donnie's car. While appellant and his friends were in the store, two police cars pulled into the lot, and the two officers entered the Dunkin Donuts. The officer/victim was in an excited state of mind, his girlfriend having just accepted his marriage proposal. As the officers entered, appellant and his friends were talking with their acquaintance who worked at the shop. A Dunkin Donuts patron described appellant as loud but not obnoxious, and testified the "guy behind the counter," appellant, Fred, and Dianne were laughing a lot, but not being annoying.

When the officers came in the store they did not get in line to make a purchase but rather, according to the patron, "stood side by side in the entrance." When Fred, Dianne, and appellant left the Dunkin Donuts carrying coffee, the officers followed them because, the surviving officer testified, the victim wanted to ask appellant some questions. Appellant followed Fred and Dianne to their car, where he received a cup of coffee which he then took towards Donnie's car to give to Amber. As he walked between the cars, the victim asked appellant for identification. The other officer, who had gone to talk to Fred, observed this exchange and testified that the victim and appellant "were just engaged in a regular conversation. It seemed real laid back." According to this officer, appellant appeared friendly, not upset or agitated. The victim then "called in" appellant's identifying information, and learned there were no warrants outstanding for appellant's arrest.

Amber testified she then observed appellant raise his hands, at which point the victim pulled out his gun. The victim, gun pulled, followed appellant to the back of the car where, Amber testified, she heard what sounded like hands being placed on the back of the car, followed by a single gun shot. Other shots followed. Dianne observed much the same scene, but testified the victim was yelling "freeze" as he pulled his gun on appellant. Appellant then raised his hands. According to Dianne, the officer then

holstered his gun and followed appellant around the back of the car, grabbing appellant and getting "on his back." Dianne clarified that the victim jumped on appellant's back, and a struggle ensued. At this point, according to Dianne and the other officer, appellant shot the victim in the face with a gun appellant had on his person. The other officer on the scene testified that at the juncture when the victim grabbed appellant from behind by the wrist and neck/shoulder area, appellant was not under arrest but remained "free to leave." He also testified that he heard the victim saying to appellant "Show me your hands" as he followed appellant towards the back of the car, but not all witnesses testified that they heard this command.

After the victim was shot in the face at close range, the other officer and appellant exchanged gunfire before appellant and Amber drove off in Donnie's car. Donnie and his fiancée had escaped from the car when appellant jumped in after the shooting began, and Amber had moved to the driver's seat.

The victim died from a combination of blood loss and a concussive injury to the spinal cord which the pathologist testified "could certainly cause immediate incapacitation." When appellant was arrested in Donnie's car later that night, he was found to have been shot as well. The victim's gun was recovered at the scene, as was a cartridge from a bullet fired from that gun. Based on the pathologist's testimony that the bullet which killed the victim may have rendered him instantly incapacitated, appellant contends that the jury could have concluded that the victim was the first to fire his gun since, had appellant shot him first, the victim would have lost the ability to operate his weapon. At least two eyewitnesses, however, reported seeing appellant shoot first.

Appellant's request for a charge on voluntary manslaughter was predicated on this Court's decision in State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981), which held in part "The killing [of a law enforcement officer] may be only manslaughter where a legal arrest is attempted in an unlawful manner, as when the passion of the accused is aroused by employment of unnecessary violence." All parties agreed that the victim had the right to question appellant, and to ask for his license. All agreed, as well,

that appellant had the right to refuse these requests, a right which he did not exercise until after answering questions, showing his identification, and raising his hands.

The parties and the judge disagree whether, after raising his hands as instructed by the officer, appellant had the right to walk away as he did, or whether, as the trial court ruled, at that point one must necessarily infer that the officer saw appellant's gun tucked in his pants, and that this observation elevated the officer's right to conduct a Terry stop into a basis for appellant's arrest. The defense argued there was no evidence from which a jury could infer the officer had seen a gun, that is, the officer never said he saw a gun on appellant, nor was there evidence that when appellant raised his arms, that the waist of his pants (and the gun presumably tucked in it) was visible. Appellant contended the court erred in assuming a fact not in evidence in order to hold that the victim had probable cause to arrest appellant as he turned and walked away. Ultimately, the judge denied the voluntary manslaughter charge based on Linder's holding that a "lawful arrest or detention" in a "lawful manner" cannot constitute sufficient legal provocation. He ruled that, as a matter of law, the victim acted in a lawful manner in attempting to effectuate the lawful arrest of appellant, whom it must be assumed the victim knew to be armed.

Appellant contends the trial court erred, and we agree. It is certainly permissible to infer, as did the trial judge, that the victim acted as he did because he observed a gun in appellant's possession. On the other hand, as the defense argues, an alternative and reasonable inference was that the victim reacted in an impermissibly aggressive manner**,** physically assaulting and then shooting appellant when he exercised his constitutional right to walk away. Unlike the trial judge, we do not find the evidence is susceptible of only one inference, and we hold he erred by holding that, as a matter of law, the victim was effectuating a lawful arrest in a lawful manner when he tackled appellant from behind.[3] The evidence in this case presented a jury

[3] We are confident that the victim's acts are explained by his knowledge that appellant was a suspect in a murder case and therefore likely to be armed. The jury, however, heard no evidence of this other crime and thus it cannot

question whether the arrest was lawful but effectuated through the victim's unnecessary use of violence, thereby entitling appellant to a voluntary manslaughter charge under Lindler.

CONCLUSION

Since the evidence, viewed in the light most favorable to appellant, warranted a voluntary manslaughter charge, appellant's murder conviction and his death sentence are

REVERSED.

MOORE, WALLER AND BEATTY, JJ., concur. TOAL, C.J., dissenting in a separate opinion.

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be used to bolster the lawfulness of appellant's detention or the victim's use of force in determining whether the evidence warranted a voluntary manslaughter charge.

CHIEF JUSTICE TOAL: I respectfully dissent. I would affirm Appellant's conviction and hold that there is no evidence supporting a voluntary manslaughter charge.

Voluntary manslaughter is the unlawful killing of a human being in the sudden heat of passion upon a sufficient legal provocation. *State v. Childers*, 373 S.C. 367, 373, 645 S.E.2d 233, 236 (2007). In cases involving the killing of a police officer, the general rule is:

> A lawful arrest or detention in a lawful manner by an officer . . . will not constitute an adequate provocation for heat of passion reducing the grade of the homicide to manslaughter; nor will other lawful acts of officers while in the discharge of their duties constitute adequate provocation . . . The killing [of a police officer] may be only manslaughter where a legal arrest is attempted in an unlawful manner, as when the passion of the accused is aroused by the employment of unnecessary violence.

State v. Linder, 276 S.C. 304, 308, 278 S.E.2d 335, 337 (1981) (quoting 40 C.J.S. *Homicide* § 116 (2007)). However, "[w]here there are no actions by the deceased to constitute legal provocation, a charge on voluntary manslaughter is not required." *State v. Wood*, 362 S.C. 135, 142, 607 S.E.2d 57, 60 (2004).

In my view, the majority errs in holding that the record contained evidence of sufficient legal provocation entitling Appellant to a voluntary manslaughter charge. Specifically, I would hold that the trial court correctly ruled that there was no evidence that the police officer shot Appellant first. While the pathologist speculated that the bullet *may* have rendered the police officer instantly incapacitated, the record reveals that the only evidence from the witnesses was that Appellant fired the first shot. Moreover, although Amber testified that she saw the police officer draw his gun and follow Appellant behind the car, she explicitly stated that she could not see if Appellant pulled a gun or who fired the first shot.[4] Accordingly, I would

[4] The trial court refused to give a voluntary manslaughter charge as well as a

hold that there was no evidence of sufficient legal provocation, and therefore, Appellant was not entitled to a voluntary manslaughter charge.

For these reasons, I would hold the trial court properly refused Appellant's request for a voluntary manslaughter charge.

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self-defense charge based on the trial court's ruling that there was no evidence that the police officer fired the first shot.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John and Jane Doe, Appellants,

v.

Baby Girl, a minor under the age of fourteen years, and Birthfather, Respondents.

Birthmother, Respondent,

v.

John and Jane Doe and Baby Girl, a minor under the age of fourteen (14) years, Defendants,

Of Whom John and Joe Doe are the Appellants.

Appeal From Richland County
Dorothy Jones, Family Court Judge

Opinion No. 26425
Heard November 15, 2007 – Filed January 28, 2008

REVERSED

Raymond William Godwin, of Greenville, for Appellants.

Robert L. Jackson, of Columbia, for Respondent Birthmother, and Birthfather, pro se, of Rockfort, Illinois.

F. Earl Ellis, Jr., of Columbia, Guardian Ad Litem.

JUSTICE WALLER: In this interstate adoption case, appellants John and Jane Doe directly appeal from two South Carolina family court orders. The first order dismissed appellants' adoption action based on jurisdictional grounds. The second order enforced an Illinois decree which ordered the return of the baby girl to respondent Birthmother in Illinois. We reverse.

FACTS

On June 16, 2006, Birthmother gave birth in Illinois to a full-term baby girl ("Baby Girl"). On June 19, 2006, court proceedings were held in Illinois circuit court. Attorney Denise Patton represented Birthmother who stated under oath that she intended to place Baby Girl up for adoption and the prospective parents resided in South Carolina. Birthmother indicated she would be signing a South Carolina consent to adoption. During the proceedings, she signed a "Consent to Guardianship" document. After questioning Birthmother, the court waived the appointment of a guardian *ad litem* and appointed Patton guardian of Baby Girl. ("June Illinois Order").

Also on June 19, 2006, Birthmother signed the following four documents: (1) a relinquishment of parental rights; (2) a consent to jurisdiction under South Carolina law; (3) an affidavit of identification; and (4) a consent to adoption. In the consent to jurisdiction document, Birthmother acknowledged that appellants, who live in South Carolina, would be filing a South Carolina petition to adopt Baby Girl. Moreover, this choice of law document expressly stated the following:

> Having been informed about the law in both South Carolina and Illinois, I hereby submit to the jurisdiction of the state of South

> Carolina. **I agree that all matters relating to the adoption of my child, including, but not limited to the right to revoke my Relinquishment**, to notice of further proceedings in the adoption and termination of my parental rights, **shall be determined in accordance with the laws of the state of South Carolina**.

(Emphasis added).

In the identification document, Birthmother checked a box indicating she did not know the identity of the biological father, yet also inconsistently stated the following: "I was raped and I only knew the birth father through friends of friends. I do not know his full name and will not say his first name." In the consent to adoption, she refused to name the birth father, but she did state he had not supported her and had not paid any pre-birth expenses.

On June 20, 2006, appellants returned to South Carolina with Baby Girl and filed an action for adoption **in South Carolina** family court.

On July 14, 2006, **Birthfather** filed a petition **in Illinois** circuit court requesting that the court void *ab initio* the June Illinois Order which appointed Patton guardian of Baby Girl for the purpose of transporting her to South Carolina. Birthfather's petition alleged that Birthmother knew the identity and whereabouts of Birthfather at all times and had told him the baby had been born dead. Birthfather argued that because he received no notice, the Illinois court was without jurisdiction to enter the June Illinois Order. Appellants were not named as parties in Birthfather's petition despite the fact that they had physical custody of Baby Girl in South Carolina at the time.

Appellants, however, upon finding out Birthfather's identity, filed an amended adoption complaint in South Carolina family court on July 21, 2006. Birthfather was named and referenced in the amended pleading. The family court thereafter granted appellants' request for an emergency hearing. The hearing took place on July 31, 2006, and Judge Turbeville issued a temporary order on August 2, 2006, which: (1) granted temporary legal custody of Baby Girl to appellants; (2) vested jurisdiction in Richland County

Family Court, South Carolina; and (3) ordered a paternity test to determine whether Birthfather was the biological father of Baby Girl. The family court specifically noted it had reviewed information regarding Birthfather's criminal history which included domestic violence and drug offenses. In addition, the family court found that, pursuant to South Carolina's Uniform Child Custody Jurisdiction Act (UCCJA), South Carolina is Baby Girl's "home state," and it was in the baby's best interest for South Carolina to assume jurisdiction.[1] ("August S.C. Order").

On August 4, 2006, Birthmother filed a petition **in Illinois** circuit court to vacate her consent to adoption and have the baby returned to her. She alleged in an affidavit that she and Birthfather began dating in January 2005 and were living together by September 2005. In mid-October 2005, she filed assault charges against Birthfather, and he was arrested. Birthmother found out she was pregnant and contacted an adoption agency, which put her in contact with appellants. Thereafter, attorney Patton contacted her to assist with the adoption and told Birthmother that appellants would be paying Patton's costs.

According to Birthmother, she signed the consent to adoption one hour before 72 hours had elapsed from birth.[2] She further stated that Patton told

[1] Birthfather had notice of this emergency hearing, but his South Carolina counsel arrived too late to participate. Counsel then filed a Rule 59(e) motion to reconsider. The family court denied the motion on October 14, 2006, because appellants did not receive timely notice of the motion.

[2] Birthmother's allegation appears to be that **Illinois law** requires that 72 hours elapse prior to consenting to adoption. At the June 19th hearing, however, Birthmother stated under oath that she was consenting to adoption by a South Carolina couple, and also her consent to that adoption was going to be memorialized as a consent **under South Carolina law**. In the Consent to Jurisdiction that she signed on June 19th, Birthmother stated the following:

> I have been advised that under South Carolina law, my Relinquishment can be signed anytime after the birth of the child and that my Relinquishment is irrevocable upon signing. I have been advised that I may challenge the validity of my Relinquishment only by filing a petition in South Carolina alleging fraud, coercion, duress,

her if she did not list Birthfather's name on the adoption papers, then he would not need to be notified. Finally, she alleged Patton had a conflict of interest representing her.

On September 8, 2006, the Illinois circuit court vacated *ab initio* the June Illinois Order which appointed Patton temporary guardian of Baby Girl. The Illinois court found that Birthmother intentionally failed to disclose Birthfather's identity and the failure to give notice to Birthfather "deprived the [Illinois] Court of the jurisdiction to have granted the guardianship." Additionally, the Illinois court ordered the return of Baby Girl **to Birthmother** in Illinois. Appellants were not named as parties to this Illinois matter and were not referenced in the written order.[3] ("September Illinois Order").

Thereafter, Birthfather filed a motion **in South Carolina** family court to vacate the August S.C. Order which awarded appellants temporary custody of Baby Girl. A hearing was held in family court before Judge Jones on October 20, 2006. On December 15, 2006, Judge Jones issued an order which found that Illinois "first exercised jurisdiction" over Baby Girl at the June 19th proceedings and "exercised continuing jurisdiction" by vacating the June Illinois Order. The family court further noted that a telephone conference was held with the presiding Illinois judge and "a determination was made that the State of Illinois is the 'home state'" of Baby Girl pursuant to South Carolina's UCCJA. The order further stated that under the ICPC,

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> or that I did not sign the Relinquishment voluntarily and that my child's best interest would be served by being removed from the care of the adoptive parents.

This is an accurate summary of the applicable South Carolina law, under which there is no waiting period required prior to signing a relinquishment for purposes of adoption. See S.C. Code Ann. §§ 20-7-1700 through 1720 (Supp. 2006).

[3] According to Respondents' brief, appellants received notice of the hearing and made a special appearance to object to jurisdiction. However, according to appellants' brief, they received only "indirect notice" of the Illinois proceedings. While they retained Illinois counsel to enter a special appearance to contest jurisdiction, appellants claim they were never provided with copies of the pleadings to vacate the guardianship.

S.C. Code Ann. § 20-7-1980(5)(a) provides for a retention of jurisdiction. Therefore, the family court granted Birthfather's motion to dismiss based on a lack of subject matter jurisdiction. ("December S.C. Order").

Meanwhile, Birthmother had filed a custody action **in South Carolina** family court on December 7, 2006, that essentially asked the South Carolina court to enforce the September Illinois Order which awarded Birthmother custody of Baby Girl. Birthmother did not name Birthfather as a party in this action. Appellants answered and filed a counterclaim and a cross-claim, naming Birthfather as a party. After a hearing, Judge Jones issued an order on February 13, 2007, which: (1) granted Birthmother's request to enforce the September Illinois Order; and (2) dismissed appellants' counterclaim and cross-claim. Additionally, the family court commanded appellants to deliver Baby Girl to Birthmother's counsel no later than February 23, 2007, "unless the Illinois court says otherwise." ("February S.C. Order").

Appellants appealed both orders and petitioned the Court of Appeals for a writ of supersedeas to leave in force the August S.C. Order which granted appellants temporary custody of Baby Girl. Those petitions were denied. It appears from the record that on February 23, 2007, appellants surrendered custody Baby Girl, who was then over eight months old.

Additional Procedural History

Approximately one month before the scheduled oral argument in this case, Birthfather's South Carolina counsel requested to be relieved. Birthfather joined in the request, and both filed affidavits with this Court. Counsel stated she believed she had just cause to make the request because, *inter alia*, Birthfather had failed to pay her as agreed. Birthfather stated in his affidavit that he knew of the hearing scheduled for November 15, 2007. He then stated as follows: "I understand that if I do not hire replacement counsel, the Court may presume that it is my intention to forfeit my rights in this matter." The Court granted the motion to be relieved. Birthfather did not retain replacement counsel and did not appear *pro se* at the oral argument.

ISSUES

1. Did the family court err in dismissing the adoption action based on a lack of jurisdiction?

2. Did the family court err in granting full faith and credit to the September Illinois Order when the Illinois proceedings were held without proper notice to appellants and they were not named as parties?

DISCUSSION

Before proceeding to the full discussion of the legal issues, we note that this is a difficult case. It is complicated, both factually and legally, and of course, it is an emotional issue for all the parties involved. Most significantly, the ultimate decision impacts the life of a very young child.

In addition, Birthfather has forfeited his rights in this matter, per his affidavit submitted to this Court. Although he is the party who petitioned the Illinois court to vacate its initial order, and he is the one who requested that the South Carolina adoption matter be dismissed, he is no longer legally asserting his rights at all in this matter.

1. Jurisdiction

Appellants argue that South Carolina is the appropriate jurisdiction to litigate the custody and adoption of Baby Girl. More specifically, appellants contend that under applicable federal and state statutes, jurisdiction vested in South Carolina when the family court issued the August S.C. Order which gave temporary custody of Baby Girl to appellants. Therefore, the Illinois court should not have issued its September Illinois Order which altered Baby Girl's custody status, and the family court erred in concluding that Illinois was properly exercising continuing jurisdiction over the custody matter. We agree.

Appellants first argue that a federal statute, the Parental Kidnapping Prevention Act (PKPA), applies to this case and the family court erred in not considering its effect.

Congress enacted the PKPA in 1980. See 28 U.S.C. § 1738A (2000). The primary purposes of the PKPA are to: (1) promote cooperation between State courts so that a determination of custody is rendered in the State which can best decide the case in the interest of the child; (2) facilitate the enforcement of custody decrees of sister States; (3) discourage continuing interstate controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child; and (4) avoid jurisdictional competition and conflict between State courts in matters of child custody which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being. See PKPA, Pub. L. No. 96-611, §7(c) (1980).

The following relevant terms are defined by the PKPA:

> (3) "custody determination" means a judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications;
>
> …
>
> (5) "modification" and "modify" refer to a custody or visitation determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody or visitation determination concerning the same child, whether made by the same court or not;
>
> (6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;
>
> (7) "physical custody" means actual possession and control of a child.

28 U.S.C.A. § 1738A(b). In addition, "home State" under the PKPA is defined as:

> the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, **and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons**.

28 U.S.C. § 1738A(b)(4) (emphasis added).

The PKPA is primarily concerned with when full faith and credit should be given to another State's custody determination. The statute directs a State to enforce, and not modify, any custody determination made consistently with the provisions of this section by another State court. 28 U.S.C. § 1738A(a). A State's custody determination is consistent with the PKPA if the State had jurisdiction under its own law, and it was either the "home State" of child or, if there is no "home State," it is in the best interest of the child that the State assume jurisdiction. See 28 U.S.C. § 1738A(c).[4]

The PKPA also provides when a State should **not** assume jurisdiction:

> A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State **where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination**.

28 U.S.C. § 1738A(g) (emphasis added).

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[4] See also Greg Waller, Note, *When The Rules Don't Fit The Game: Application Of The Uniform Child Custody Jurisdiction Act And The Parental Kidnaping Prevention Act To Interstate Adoption Proceedings*, 33 Harv. J. on Legis. 271, 282 (1996) (Under the PKPA, preference is given to "home state" jurisdiction, but "best interest" jurisdiction may be asserted when no other state qualifies as the child's "home state") (hereinafter "*When The Rules Don't Fit The Game*").

In other words, when another state has already entered a custody determination concerning this child, the inquiry is "whether the first-in time court's exercise of jurisdiction was in accordance with the PKPA and whether that jurisdiction continues." People ex rel. A.J.C., 88 P.3d 599, 611 (Colo. 2004).

Appellants' argument is that the August SC Order granting them temporary custody of Baby Girl was consistent with the PKPA, and therefore, the September Illinois Order was issued in contravention of the PKPA. This begs the question of whether the very first order issued in this case – the June Illinois Order – was a custody order for PKPA purposes. If it was, then arguably Illinois is the "first-in-time" court, and the August SC Order should not have been issued. However, in our opinion, the initial Illinois order was not a "custody determination" as that term is used in the PKPA.

First, we note the record reveals no "pleadings" for the June Illinois proceedings. Likewise, there is no **written** order in the record. The only evidence of the proceedings is the June 19th transcript. From this transcript, we find that the purpose and result of the proceedings was a limited one – to name attorney Patton temporary guardian for the purpose of facilitating both the interstate transport of Baby Girl from Illinois to South Carolina and the subsequent South Carolina adoption. Indeed, it appears that under Illinois law, such naming of a guardian empowers the guardian to consent to adoption. See 705 Ill. Comp. Stat. Ann 405/3-30; see also 750 Ill. Comp. Stat. Ann.50/1(F) (stating that a child is available for adoption when a person authorized by law, other than the parents, has consented).

The PKPA clearly envisions physical custody determinations. See 28 U.S.C.A. § 1738A(b)(7). In the instant case, Baby Girl never "lived with" Patton – Patton simply never had physical custody of the baby. Moreover, it is obvious from the transcript that Patton was not named guardian for the purpose of her becoming a "person acting as a parent," and Patton has never claimed a right to Baby Girl's custody. See § 1738A(b)(6). Consequently,

we find the June Illinois Order was not a "custody determination" as that term is defined under the PKPA.[5]

Because its initial order was not a custody determination, the Illinois courts simply did not have jurisdiction **over the custody of Baby Girl** prior to the South Carolina court's exercise of jurisdiction. Additionally, Illinois could not have "continuing jurisdiction" if it never had initial jurisdiction over the custody matter; therefore, the Illinois court also did not have jurisdiction under the PKPA to issue its September Illinois Order. See § 1738A(d) (providing for continuing jurisdiction only if the custody determination originally made was consistent with the PKPA).

Therefore, the South Carolina family court was, under the PKPA, the "first-in-time" court to make a custody determination when it issued the August SC Order which granted temporary legal custody of Baby Girl to appellants. People ex rel. A.J.C., supra. The next inquiry is whether this order was issued properly under the PKPA.

The August SC Order determining custody is consistent with the PKPA if the family court had jurisdiction under South Carolina law, and: (1) South Carolina was the home State under the PKPA, or (2) if no home State existed at the time, it was in Baby Girl's best interest for South Carolina to assume jurisdiction. See 28 U.S.C. § 1738A(c). Pursuant to the PKPA, the best interest of the child is met when the child and at least one contestant have a significant connection with the State assuming jurisdiction (other than mere physical presence in the State), and there is substantial evidence concerning the child's present or future care, protection, training, and personal relationships in the State assuming jurisdiction. 28 U.S.C. § 1738A(c)(2)(B).

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[5] We recognize that many guardianship orders may indeed be custody determinations subject to the PKPA, but only when those orders truly confer custody of the child on the named guardian. See, e.g., Jackson v. Hendricks, 893 A.2d 292 (Vt. 2005) (where the case involved a Vermont family court's modification of an existing custody determination which was a Connecticut order awarding legal guardianship, i.e. custody, of the child to his maternal grandmother). It is clear, however, that the Illinois "guardianship" in the instant case is distinct from a guardianship which awards custody.

When the family court issued the August SC Order granting temporary custody to appellants, Baby Girl had been living with appellants in South Carolina since she was four days old, and appellants had filed an adoption action in South Carolina family court. Because Baby Girl was born in Illinois and hence had not lived in South Carolina from birth, we find South Carolina cannot be considered Baby Girl's home State.[6] We find, however, that it clearly was in Baby Girl's best interest to have South Carolina assume jurisdiction because, **at that time**, she had a significant connection to this State, and South Carolina was the only State in which there was evidence concerning her care and personal relationships. See 28 U.S.C. § 1738A(c)(2)(B). Accordingly, we hold the August SC Order granting appellants' temporary custody of Baby Girl was proper under the PKPA.

In contrast, the September Illinois Order contravened the PKPA. When the Illinois court granted Birthfather's request to vacate the guardianship proceedings and ordered the return of Baby Girl to Birthmother, there was already in place a South Carolina custody order. Thus, we agree with appellants that the September Illinois Order ran afoul of the PKPA. See 28 U.S.C. § 1738A(a) (a State shall not modify any custody determination made consistently with the provisions of this section by another State court). Furthermore, under 28 U.S.C. § 1738A(g),[7] the Illinois court should not have modified the custody arrangement because there was an adoption action pending in South Carolina which was proceeding properly under the PKPA. Thus, we agree with appellants that the Illinois court's exercise of jurisdiction which modified the custody arrangement violated the PKPA.

Appellants next argue that under South Carolina's Uniform Child Custody Jurisdiction Act ("UCCJA"), South Carolina is the "home State" of Baby Girl. As stated above, however, we find that South Carolina cannot be

[6] The "home State" concept will be discussed more fully *infra*.

[7] Section 1738A(g) states that a State court shall not exercise jurisdiction in any proceeding for a custody determination that is "commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with" the PKPA.

Baby Girl's "home State." Instead, we find Baby Girl had no home state under either the PKPA or the UCCJA.

The Legislature passed the UCCJA in 1981. See S.C. Code Ann. § 20-7-782 *et seq*. (1985). The stated purposes of the legislation are essentially the same as those listed above for the PKPA. See S.C. Code Ann. § 20-7-784(a)(1)-(3). The Court of Appeals has held that because an adoption action ultimately results in the termination of a natural parent's custody rights, an adoption proceeding properly falls within the ambit of the UCCJA. Clark v. Gordon, 313 S.C. 240, 242-43, 437 S.E.2d 144, 145-46 (Ct. App. 1993).

Similar to the PKPA, the UCCJA defines "home State" as:

> the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old the state in which the child lived from birth with any of the persons mentioned.

S.C. Code Ann. § 20-7-786(5). The UCCJA confers jurisdiction on the South Carolina family court if South Carolina is the home State of the child at the time of commencement of the proceeding. S.C. Code Ann. § 20-7-788(a)(1). In the alternative, the UCCJA allows jurisdiction if it is in the best interest of the child, defined similarly as in the PKPA. See S.C. Code Ann. § 20-7-788(a)(2).

Regarding the home State debate, courts in several jurisdictions have decided that when a baby who is born in one State, but within days of birth is transported to another State, the baby simply has **no** home State. See, e.g., In re Zachariah K., 6 Cal.App.4th 1025 (Cal. Ct. App. 1992); Matter of Adoption of Baby Girl B., 867 P.2d 1074, 1080 (Kan. Ct. App. 1994); Matter of Adoption of Child by T.W.C., 636 A.2d 1083, 1088 (N.J. Super. Ct. 1994). We agree with these jurisdictions and find that Baby Girl has no home State under the UCCJA.

First, the express language of the home State definition precludes South Carolina from being the home State of Baby Girl. S.C. Code Ann. § 20-7-786(5) (when the child is less than six months old, the home State is the State in which the child lived **from birth**). Baby Girl was born in Illinois; she did not live in South Carolina from birth. Second, because Baby Girl was born in Illinois, but only remained in that State for less than four days, Illinois cannot be considered the home State of Baby Girl. Cf. In re D.S., 840 N.E.2d 1216, 1222 (Ill. 2005) (where the Illinois Supreme Court stated that "a temporary hospital stay incident to delivery is simply insufficient to confer 'home state' jurisdiction" under the UCCJEA). Accordingly, we find Baby Girl had no home State at the time the orders on appeal were issued.

When the child has no home State, the court must "examine whether a sufficiently significant connection and substantial evidence exists to exercise jurisdiction." In re Amberley D., 775 A.2d 1158, 1164 (Me. 2001); see also 28 U.S.C. § 1738A(c)(2)(B) (jurisdiction vests if in best interest of child); S.C. Code Ann. § 20-7-788(a)(2) (same).

We find that under both the PKPA and the UCCJA, the South Carolina family court had appropriately assumed jurisdiction when it issued the August SC Order. See id. Because jurisdiction was proper in South Carolina, Illinois inappropriately modified the custody determination in its September Illinois Order. See 28 U.S.C. § 1738A(g); see also S.C. Code Ann. § 20-7-794(a).

In sum, we hold the family court erred in dismissing appellants' adoption case based on a lack of jurisdiction.[8] Under both federal and state

[8] We note the family court also erred in finding that pursuant to the ICPC, Illinois had jurisdiction in this case. While the ICPC does state that the "sending agency shall retain jurisdiction over the child sufficient to determine all matters in relation to the custody … of the child which it would have had if the child had remained in the sending agency's state, until the child is adopted," S.C. Code Ann. § 20-7-1980 (1985), we find this section was not meant to trump both the federal (PKPA) and state (UCCJA) statutory sections more specifically related to conferring jurisdiction. See *When The Rules Don't Fit The Game*, 33 Harv. J. on Legis. at 288 n.76 ("Since a court is only one of many parties that may be a 'sending

law, the South Carolina family court had jurisdiction to make the custody determination found in the August SC Order.

2. Full Faith and Credit

Appellants next argue the family court erred in its February SC Order when it accorded full, faith and credit to the September Illinois Order. Appellants maintain the Illinois order is flawed because they were not named as parties to the Illinois actions and were not given proper notice and an opportunity to be heard. We agree.

The PKPA requires that before a custody determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated, and any person who has physical custody of a child. 28 U.S.C. § 1738A(e); see also S.C. Code Ann. § 20-7-790 (providing the same requirements under the UCCJA).

"The purpose of the UCCJA requiring notice is to preserve the fairness of the hearing." Clark v. Gordon, 313 S.C. 240, 246, 437 S.E.2d 144, 147 (Ct. App. 1993). Put simply, the family court must "'afford full faith and credit to custody orders of other states **only if** those orders are competently entered in accordance with standards set forth in'" the UCCJA. Id. at 245, 437 S.E.2d at 147 (Ct. App. 1993) (quoting Purdie v. Smalls, 293 S.C. 216, 222, 359 S.E.2d 306, 309 (Ct. App. 1987)) (emphasis added). In other words, "judgments obtained in violation of procedural due process are not entitled to full faith and credit when sued upon in another jurisdiction." Purdie v. Smalls, 293 S.C. at 220, 359 S.E.2d at 308.

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agency' under the ICPC, 'jurisdiction' arguably has a different meaning under the ICPC than under the UCCJA and PKPA."). Moreover, we note the ICPC was designed to ensure that placements for children across state lines are safe; it was not designed to protect the rights of the birth parents. In re Adoption/Guardianship No. 3598, 701 A.2d 110, 121 (Md. 1997). Certainly, there was no evidence that Baby Girl's placement with appellants had become unsafe in any way.

Here, it is clear from the face of the Illinois pleadings appellants were never named as parties despite the fact that they had physical custody of Baby Girl. This is a patent violation of both federal and state law. See 28 U.S.C. § 1738A(e); S.C. Code Ann. § 20-7-790.

Moreover, although appellants received indirect notice of the Illinois hearing and retained an attorney to enter a special appearance, they were never officially served notice of the hearing and were not provided with copies of the pleadings. Respondents contend that because appellants admit they had actual notice and made an appearance, their due process rights were protected. We disagree. Where there is not even an attempt at service of process, the notice requirements of the PKPA are not met, and actual notice is insufficient to confer personal jurisdiction. See Ex parte D.B., ___ So.2d ___, 2007 WL 1723618, *12-13 (Ala. 2007).

In the instant case, appellants were consistently excluded as parties from the Illinois pleadings filed by both Birthfather and Birthmother. This was unfair to appellants who, at the time, had physical custody of Baby Girl. We find appellants' due process rights were compromised in the resulting Illinois court proceedings, and therefore, South Carolina is not bound by the September Illinois Order. Clark v. Gordon, supra (judgments obtained in violation of procedural due process are not entitled to full faith and credit).

Accordingly, we hold the family court erred in issuing its February SC Order which enforced the September Illinois Order awarding custody to Birthmother.

CONCLUSION

For the reasons discussed above, we reverse the family court orders which dismissed appellants' adoption action and enforced the Illinois custody award to Birthmother. Accordingly, we reinstate: (1) the August SC Order awarding custody of Baby Girl to appellants, and (2) appellants' adoption action. Furthermore, we order Birthmother to return Baby Girl to appellants within fifteen (15) days of the date of this opinion. This matter is remanded to the family court for further proceedings consistent with our decision.

REVERSED AND REMANDED.

MOORE, A.C.J., PLEICONES, BEATTY, JJ., and Acting Justice J. Ernest Kinard, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of O. Lee Sturkey, Respondent.

Opinion No. 26426
Heard December 5, 2007 – Filed January 28, 2008

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Assistant Deputy Disciplinary Counsel, both of Columbia; for the Office of Disciplinary Counsel.

C. Rauch Wise, of Greenwood; for Respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) filed formal charges against respondent, O. Lee Sturkey, alleging misconduct in eight different criminal matters. Sturkey failed to answer, and he was found to be in default. After a hearing, both the sub-panel and the full panel of the Commission on Lawyer Conduct recommended that respondent be sanctioned with: a nine-month definite suspension; mandatory compliance with a law office management assistance program as a condition of reinstatement; and payment of costs of the

proceedings. We impose the recommended sanction. However, we address ODC's argument on appeal that the Commission erred in allowing certain evidence to be considered in mitigation without giving ODC the opportunity to present counter-testimony.

FACTS

Respondent, the part-time public defender for McCormick, Edgefield, and Saluda counties, had a caseload averaging more than 700 cases per year. Eight complaints against him by clients or spouses of clients were received by ODC. Respondent failed to respond to the formal charges, and he was held in default. The factual allegations regarding the eight matters, as admitted by virtue of respondent's default, are as follows: (1) ODC received a complaint from Client A alleging respondent failed to adequately represent him in a criminal matter; (2) ODC received a complaint from Client B alleging respondent failed to adequately communicate with him regarding a criminal matter and that he failed to appear in court; (3) ODC received a complaint from Client C alleging respondent failed to pursue his client's objectives and failed to adequately communicate with him about his criminal case; (4) ODC received a complaint from Client D alleging respondent failed to pursue his objectives in his criminal matter; (5) ODC received a complaint from Client E alleging respondent failed to provide him with information and documents he requested relating to his criminal case; (6) ODC received a complaint from Client F alleging respondent failed to adequately communicate with him about his criminal case; (7) ODC received a complaint from Client G alleging respondent failed to diligently pursue his criminal case and failed to respond to his calls and letters; and (8) ODC received a complaint from the husband of Client H, alleging respondent engaged in confidential conversations with Client H in front of law enforcement officers and respondent failed to provide her with competent and diligent representation. Respondent failed to: comply with ODC's initial requests to respond to the complaints of Client A and Client B; respond to the request for a written response in all eight matters; and provide additional information requested by ODC, including client files, in regard to Client A, Client B, Client F, and Client G.

The Hearing

Because respondent admitted the factual allegations by virtue of his default, a hearing was held before the sub-panel solely for the purpose of recommending an appropriate sanction. Despite the fact that respondent only gave ODC notice of witnesses via telephone two days before the hearing, ODC did not object to the presentation of respondent's mitigation witnesses. One of the witnesses was Ervin Maye, the assistant solicitor in charge of McCormick, Edgefield, and Saluda counties. In addition to testifying favorably about his observations of respondent's skills as a trial lawyer and character, Maye began to testify regarding the favorable disposition of some of the criminal matters against the complainants. ODC objected to any testimony regarding the underlying criminal matters, arguing they were deemed admitted by default and any testimony regarding lack of harm would have no bearing on the case. The sub-panel allowed the testimony, limited to whether a client was harmed, and denied ODC's request for a continuance in order to call the complainants to testify to counter the information.

After Maye's testimony regarding the outcome of some of the matters, ODC renewed its objection to the consideration of the outcome of the clients' cases in determining harm because they were not given notice of the purpose of Maye's testimony such that they could present counter testimony regarding harm to clients. The sub-panel ultimately denied the motion, stating it considered all the matters from the complaint deemed admitted via respondent's default.

After presenting the testimony of another character witness, respondent testified. Respondent stated he had a large caseload as a public defender, but he could not explain his failure to respond to ODC's requests other than being completely overwhelmed. Over ODC's objections, respondent also testified regarding the favorable outcomes of the cases involving Clients B, C, D, E, F, and H.

After the hearing, the sub-panel found respondent engaged in misconduct in violation of: Rule 7(a)(1) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR (violating a Rule of Professional Conduct); Rule 7(a)(3) (willful failure to comply with a subpoena or knowing failure to respond to a lawful demand from a disciplinary authority); and Rule 7(a)(5) (conduct tending to pollute the administration of justice or bringing the legal profession into disrepute). With regard to the specific matters before the sub-panel, it found respondent violated the following rules:

> (1) Rule 1.4, RPC (failure to communicate with a client) with regard to Clients B, C, E, F, and G;
> (2) Rule 1.2, RPC (failure to pursue client's objectives and scope of representation) in the matters involving Clients C and D;
> (3) Rule 1.3, RPC (failure to represent with due diligence) with regard to Clients G and H; and
> (4) Rule 1.1, RPC (competence), and Rule 1.6 (confidentiality) with regard to Client H.

The sub-panel considered as aggravating factors: (1) respondent's prior disciplinary history and failure to comply with the requirement that he change the way he ran his office; (2) his pattern of misconduct and multiple offenses; (3) his failure to respond to or cooperate with ODC; and (4) his substantial experience practicing law. The sub-panel considered as mitigating factors the evidence of respondent's good character and abilities as a trial lawyer. With regard to the evidence that there was no harm to clients, the sub-panel stated:

> We recognize that client harm is a subjective factor difficult to measure when clients plead guilty, but we do consider the apparent lack of harm as a mitigating factor for which we give appropriate weight in our discretion as a panel. As a result of Respondent's failure to answer the formal charges, it is undisputed that Respondent failed to adequately communicate with his clients in the [Client B], [Client C], [Client E], [Client F], and [Client G] matters; that he failed

> to adequately pursue his clients' objectives in the [Client C] and [Client D] matters; that he failed to diligently pursue his clients' cases in the [Client G] and [Client H] matters, and, that he failed to competently represent [Client H] and revealed confidential information in her case. The facts that these clients ultimately plead [sic] guilty to lesser offenses than those with which they were originally charged and that the solicitor believes these were good results are given slight consideration in our recommendation, due to the difficulty in measuring harm under such circumstances.

The sub-panel gave some consideration to respondent's heavy caseload and the systematic problems with the public defender system, but it found respondent still had the obligation to only accept as many cases as he could ethically handle. The sub-panel noted that, at a minimum, respondent should have adopted the case and office management systems introduced to him during his participation in LOMAP pursuant to his 2000 disciplinary sanction. Finally, the sub-panel noted respondent's large caseload and the lack of harm to clients did not excuse his failure to respond to or communicate with his clients. After considering all of these matters, the sub-panel recommended respondent be sanctioned with a definite suspension of nine months, required to participate in a law office management assistance program, and pay the costs of the proceedings.

Over ODC's objection that it was error for the sub-panel to consider Maye's testimony of a favorable result as evidence of no harm to clients, the full panel adopted the sub-panel's report and recommendation. ODC appeals.

DISCUSSION

Neither ODC nor Sturkey complain about the recommended sanction. Sturkey's failure to communicate with his clients, failure to pursue their objectives, and failure to respond to ODC inquiries and requests to answer or

provide documentation regarding the eight matters are serious offenses. Considering Sturkey's failure to adequately communicate with his clients and complete disregard for the disciplinary process, we agree with the Commission that Sturkey violated the Rules of Professional Conduct and, thus, there are grounds for discipline in this case. See Rule 1.1, RPC (competence); Rule 1.2, RPC (failure to pursue client's objectives and scope of representation); Rule 1.3, RPC (failure to represent with due diligence); Rule 1.4, RPC (failure to communicate with a client); and Rule 1.6 (confidentiality); Rule 7(a)(1), RLDE (violating a Rule of Professional Conduct); Rule 7(a)(3), RLDE (willful failure to comply with a subpoena or knowing failure to respond to a lawful demand from a disciplinary authority); and Rule 7(a)(5), RLDE (conduct tending to pollute the administration of justice or bringing the legal profession into disrepute).

Because of the seriousness of his offenses, we find the Commission's recommendation of a nine-month suspension, mandatory compliance with a law office management assistance program, and payment of costs is appropriate. See In re Strait, 343 S.C. 312, 540 S.E.2d 460 (2000) (sanctioning attorney to a six-month and one day suspension for: failing to act diligently; failing to return client phone calls; failing to inform client of dismissal of case; failing to return client materials; and failing to timely respond to ODC correspondence); In re Shibley, 337 S.C. 50, 522 S.E.2d 812 (1999) (sanctioning attorney to a two-year suspension for: failing to represent client diligently, promptly, and competently; failing to keep client informed about the status of the case; terminating representation without taking steps to protect client's interest; violating a valid court order; and failing to cooperate with the ODC investigation); In re Matson, 333 S.C. 242, 509 S.E.2d 263 (1998) (sanctioning attorney to a definite suspension for eighteen months for: neglect of legal matters; failure to communicate with clients; failure to protect clients' interests when terminating representation; and failure to cooperate with ODC).

However, ODC complains that the Commission should not have considered the testimony regarding the final disposition of the complainants' cases as evidence of lack of harm in mitigation without allowing ODC the opportunity to present counter-evidence. We agree.

Generally, parties to disciplinary proceedings are required to exchange witness lists within twenty days of filing the answer. Rule 25(a), RLDE. The parties also must exchange documents and witness statements to be presented at the hearing. Rule 25(b)(1), RLDE. Where a party fails to timely disclose witness names or statements as required by the rules, the sub-panel or hearing officer may "grant a continuance of the hearing, preclude the party from calling the witness or introducing the document, or take such other action as may be appropriate." Rule 25(g), RLDE.

ODC did not object to respondent presenting witnesses in mitigation, despite the fact that he defaulted, failed to cooperate in general, and failed to give sufficient prior notice of the witnesses. Maye's mitigating testimony regarding the ultimate outcome of the complainants' cases touched on more substantive matters than the usual mitigation testimony regarding the respondent's character and personal situation. Lack of harm, similar to lack of prejudice, may be considered as mitigating evidence in a disciplinary action. In re McFarland, 360 S.C. 101, 105, 600 S.E.2d 537, 539 (2004) (considering the lack of prejudice to the client's case as a mitigating factor). However, considering the surprise nature of the lack of harm evidence presented in this default case, it should have been considered in conjunction with rebuttal evidence showing actual harm. Despite the Commission's finding that it did not give much weight to the lack of harm evidence, we find the Commission abused its discretion in denying the continuance because it did not allow ODC the opportunity to obtain and present evidence to rebut the surprise lack of harm evidence.

We agree with the parties that a nine-month suspension, with participation in a law office management program and payment of costs, is the appropriate sanction for respondent. We caution the Commission in the future to carefully weigh the continuance decision when, as in the present case, the parties present surprise evidence without prior notice to the obvious disadvantage of the other party.

DEFINITE SUSPENSION.

TOAL, C.J., MOORE, WALLER, PLEICONES and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Nancy S. Layman, David M. Fitzgerald,Vicki K. Zelenko, Wyman M. Looney, Nancy Ahrens, James Haynes, and Janice Franklin, on behalf of themselves and all others similarly situated, Respondents/Appellants,

v.

The State of South Carolina and The South Carolina Retirement System, Appellants/Respondents.

Appeal from Richland County
John L. Breeden, Circuit Court Judge

Opinion No. 26427
Heard September 19, 2007 – Filed January 28, 2008

AFFIRMED AS MODIFIED

David K. Avant and Kelly H. Rainsford, both of The South Carolina Retirement System, of Columbia, and Robert E. Stepp, Roland M. Franklin, Jr., Amy L. B. Hill, and Tina Cundari, all of Sowell Gray Stepp & Lafitte, of Columbia, for Appellants/Respondents.

A. Camden Lewis, Keith M. Babcock, and Ariail E. King, all of Lewis & Babcock, of Columbia, and Richard A. Harpootlian, of Columbia, for Respondents/Appellants.

Michael R. Hitchcock, David A. Good, and Mikell C. Harper, all of Columbia, for Amici Curiae the Honorable Glenn F. McConnell and the Honorable Robert W. Harrell, Jr.

CHIEF JUSTICE TOAL: This is an appeal of an award of $8.66 million in attorneys' fees. The circuit judge, acting pursuant to a prior order of this Court, awarded fees under a statute authorizing attorneys' fees and both parties appealed. We affirm the circuit judge's decision to award attorneys' fees, but reduce the amount awarded due to several errors of law in the circuit judge's decision.

FACTUAL/PROCEDURAL BACKGROUND

The facts leading up to this controversy are fully recounted in this Court's opinion in the case *Layman v. The State of South Carolina and The South Carolina Retirement System*, 368 S.C. 631, 630 S.E.2d 265 (2006) [hereinafter *Layman*]. In *Layman*, five plaintiffs filed an action in the circuit court against the State of South Carolina ("State") and the South Carolina Retirement System ("Retirement System") in response to the enactment of the State Retirement System Preservation and Investment Reform Act[1] ("Act 153"). Act 153 amended the Teachers and Employee Retention Incentive (TERI) program and the Working Retiree program by requiring TERI participants and Working Retirees to make pay-period contributions of their salaries into the Retirement System when the statutes codifying these programs did not previously require them to do so.[2]

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[1] Act No. 153, 2005 S.C. Acts 1697.

[2] The TERI program is codified at S.C. Code Ann. § 9-1-2210 *et. seq.* (Supp. 2006). The Working Retiree program is codified at S.C. Code Ann. § 9-1-1790 (Supp. 2006).

This Court granted the plaintiffs' petition for original jurisdiction and certified a class consisting of Working Retirees and TERI participants who entered into these programs prior to Act 153's effective date. In the order granting original jurisdiction, the Court set forth a timeline on which the case was to proceed and further ordered the Retirement System to deposit all contributions made by members of the class into an interest-bearing escrow account until the Court entered a final decision in the matter. The parties briefed and argued the case in this Court, and the Court ultimately held that Act 153 breached a legislatively-created contract as to the class of TERI participants, but not necessarily as to the class of Working Retirees. The Court ordered the return of contributions made by all TERI participants between the effective date of Act 153 and the date of the Court's opinion, with interest, and held that the TERI participants were no longer required to contribute money to the Retirement System.[3]

Following the Court's opinion in *Layman*, counsel for the TERI plaintiffs requested that the Court award attorneys' fees under one of two alternative theories: (1) an award of attorneys' fees under the common fund doctrine, or (2) an award of costs to include attorneys' fees pursuant to S.C. Code Ann. § 15-77-300 (2005) ("the state action statute"). This Court denied counsel's motion for attorneys' fees under the common fund doctrine and remanded the request for costs to a circuit judge to determine whether counsel were entitled to attorneys' fees under the state action statute. The Court further instructed the circuit judge to determine the amount of any such

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[3] As to the Working Retirees' claims, the Court determined that the terms of the Working Retiree statute did not create a contract between the State and the Working Retirees. For this reason, the Court remanded the Working Retirees' claims for a case-by-case factual determination as to whether the State had entered into individual written contracts with the Working Retirees which may have been breached by enforcement of Act 153. *Layman*, 368 S.C. at 643, 630 S.E.2d at 271-72. Therefore, attorneys' fees on behalf of Working Retirees are not at issue here.

fees "based on the actual amount of work performed, expenses incurred, and the benefit obtained for all of the old TERI participants." *Layman v. State*, S.C. Sup. Ct. Order dated June 1, 2006 (Shearouse Adv. Sh. No. 21 at 18). The Court's order also decertified the class of TERI plaintiffs.

On remand, the circuit judge determined that counsel were entitled to attorneys' fees under the state action statute, and that the language of the statute, read in conjunction with this Court's directive in the remand order, did not limit an award of attorneys' fees to an amount based on the hourly fee of plaintiffs' counsel. Rather, the judge determined that counsel were entitled to attorneys' fees based on a "percentage of the benefits obtained in conjunction with the amount of work performed in obtaining such results." Accordingly, the circuit judge awarded counsel all "expenses incurred" in litigating the underlying case, as well as 21% of the "immediate benefit" recovered for all TERI participants, and 1% of the projected "future benefit" provided by counsel to all TERI participants.[4] These figures resulted in an award of $8,665,297.50 in attorneys' fees to be paid by the State and the Retirement System pursuant to the state action statute.

The State and the Retirement System filed a notice of appeal, and counsel for TERI plaintiffs filed a cross-appeal. We certified the appeals to this Court pursuant to Rule 204(b), SCACR.

[4] The "expenses incurred" totaled $4,724.10. This figure represents an accounting of counsel for the TERI plaintiffs' actual expenses in litigating *Layman*. The circuit judge defined the "immediate benefit" as the contributions to the Retirement System that this Court ordered be immediately returned to the old TERI participants following the opinion in *Layman*. These contributions totaled $37,812,255.60. The circuit judge defined the "future benefit" as the income stream that would have been created by contributions of the old TERI participants had Act 153 continued to be enforced, discounted to present day value. This amount totaled approximately $72 million.

The parties' dispute in this case essentially involves two issues. First, the State and the Retirement System argue that the circuit judge erred in finding that counsel were entitled to attorneys' fees under the state action statute, which requires a finding that the State and the Retirement System acted without "substantial justification" in defending their claim. S.C. Code Ann. § 15-77-300. As a second issue, all parties question the circuit judge's method of determining a reasonable fee. The State and the Retirement System argue that the circuit judge should not have determined an award of attorneys' fees based on a percentage of the TERI participants' recovery, and that using this method of calculation resulted in an unreasonably high award of attorneys' fees. In the cross-appeal, counsel for the TERI plaintiffs argue that the circuit judge correctly calculated the attorneys' fees as a percentage of the TERI participants' recovery, but that the percentage used resulted in an unreasonably low fee award.

STANDARD OF REVIEW

The decision to award or deny attorney's fees under the state action statute will not be disturbed on appeal absent an abuse of discretion by the trial court in considering the applicable factors set forth by the statute. *McMillan v. S.C. Dept. of Agric.*, 364 S.C. 60, 76, 611 S.E.2d 323, 331 (Ct. App. 2005). An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001). Similarly, the specific amount of attorneys' fees awarded pursuant to a statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion. *See Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997). In this case, however, the issue of the amount of attorneys' fees awarded hinges on the Court's interpretation of "reasonable" attorneys' fees as contained in the state action statute. The interpretation of a statute is a question of law, which this Court reviews de novo. *Catawba Indian Tribe v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

LAW/ANALYSIS

I. "Substantial justification" under the state action statute.

The State and the Retirement System argue that the circuit judge erred in finding that counsel were entitled to an award of attorneys' fees under the state action statute. We disagree.

The state action statute provides in relevant part:

> In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:
>
> (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
>
> (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

S.C. Code Ann. § 15-77-300. In the instant case, the State and the Retirement System argue that the circuit judge abused his discretion in finding that they acted without substantial justification in pressing their claim and that the circuit judge therefore erred in awarding attorneys' fees under the state action statute.

Substantial justification for purposes of the state action statute means "justified to a degree that could satisfy a reasonable person." *Heath v. County of Aiken*, 302 S.C. 178, 183, 394 S.E.2d 709, 712 (1990) (quoting *Pierce v. Underwood*, 487 U.S. 552, 564 (1988)). Therefore, in deciding whether a state agency acted with substantial justification, the relevant question is whether the agency's position in litigating the case had a

reasonable basis in law and in fact. *McDowell v. S.C. Dept. of Soc. Servs.*, 304 S.C. 539, 542, 405 S.E.2d 830, 832 (1991). Although an agency's loss on the merits does not create a presumption that its position was not substantially justified, *Video Gaming Consultants, Inc. v. S.C. Dept. of Revenue*, 358 S.C. 647, 650, 595 S.E.2d 890, 892 (Ct. App. 2004), the substance and outcome of the matter litigated is nevertheless relevant to the determination of whether there was substantial justification in pressing a claim. *Heath*, 302 S.C. at 183, 394 S.E.2d at 712.

The State and the Retirement System initially argue that the state action statute does not apply because the TERI plaintiffs brought this suit against the State of South Carolina, with the state agency (the Retirement System) included merely as a "stakeholder." The State and the Retirement System contend that under this procedural framework, the actions of the Retirement System are irrelevant. From this premise, the State and the Retirement System argue that the State's actions (through the General Assembly) in adopting Act 153 may not be scrutinized under a statute that references agency action, and furthermore, that an award of attorneys' fees based on a finding that the General Assembly acted without substantial justification in taking a particular legislative action violates separation of powers principles. Accordingly, the State and the Retirement System argue that the terms of the state action statute prevent either of them from being liable for attorneys' fees. We disagree.

We first find the characterization of the Retirement System as merely a stakeholder in this litigation to be wholly inaccurate. While it is true that early in the litigation, counsel for TERI plaintiffs stated to the trial court that the only reason for including the Retirement System as a party to the suit was because the agency was a "stakeholder" with respect to the employee contributions at issue, and that their clients' substantive claims were with the State alone, the central focus of the litigation has been the actions of both the State and the Retirement System, with the Court referring to these entities jointly as "the State." *See Layman*, 368 S.C. 631, 630 S.E.2d 265. The Retirement System is a named party in the caption of this case, and moreover, the Court specified that both entities would be liable when it directed the circuit judge to determine the issue of whether attorneys' fees were to be

"taxed as court costs against the State of South Carolina and the South Carolina Retirement System" under the state action statute. *Layman v. State*, S.C. Sup. Ct. Order dated June 1, 2006 (Shearouse Adv. Sh. No. 21 at 18).

In our view, separating the liability of the State and the Retirement System is simply an attempt by these parties to bar any potential for a fee award, and this Court refuses to compartmentalize the actions of the State and the Retirement System in this manner. Instead, we believe the overriding principle of the state action statute is that as a state agency, the Retirement System is obligated to carry out the instructions of the State. Furthermore, as a governing body, the State is ultimately responsible for the actions of its agencies. That the statute plainly recognizes this principle is exhibited by the language purporting to apply to cases in which a party is "contesting state action." S.C. Code Ann. § 15-77-300. For this reason, we find the attempt to parse the actions of the State and the Retirement System unpersuasive, and therefore hold that either the State or the Retirement System may be liable for attorneys' fees under the statute.

Turning to the State's and the Retirement System's separation of powers argument, we find that although a judicial holding that the legislature "failed" in some legislative capacity might give rise to separation of powers concerns, this is not what we held in *Layman*. Instead, this Court held that the collective actions of the State and the Retirement System breached a contract with certain TERI participants. In light of this holding, the relevant question in a substantial justification inquiry in this case does not lie with the wisdom behind the State's enactment of Act 153 in and of itself, nor does it lie with the authority of the Retirement System to enforce the statute. Rather, the substantial justification inquiry in this case is based solely on the State's and the Retirement System's maintenance of litigation in which they defended a breach of their contract with the TERI participants. Accordingly, separation of powers concerns are not implicated by an assessment of liability for attorneys' fees in this case.

The State and the Retirement System next argue that the state action statute does not allow an award of attorneys' fees because they were substantially justified in pressing their claim. We disagree.

The State and the Retirement System contend that their actions in *Layman* were substantially justified under *Video Gaming Consultants, Inc. v. S.C. Dept. of Revenue*, 358 S.C. 647, 595 S.E.2d 890 (Ct. App. 2004). In that case, a video gaming business sought attorneys' fees under the state action statute after this Court ruled in the underlying litigation that a state statute prohibiting the advertising of video poker machines was an unconstitutional restriction on commercial speech. *See id.* at 649, 595 S.E.2d at 891. The court of appeals found no evidence that the Department of Revenue acted without substantial justification in pressing its claim against the gaming business, reasoning that "[a]s an administrative agency, the Department 'must follow the law as written until its constitutionality is judicially determined.'" *Id.* at 652, 595 S.E.2d at 892 (quoting *Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm.*, 335 S.C. 230, 241, 516 S.E.2d 655, 660-61 (1999)). The court of appeals determined that the Department of Revenue was substantially justified in maintaining its action against the gaming business because the Department was "merely enforcing [the statute] as it was obligated to do until a proper court determined the statute to be unconstitutional." *Id.* Therefore, the court of appeals held that the video gaming business could not recover attorneys' fees under the statute.

We find the instant case distinguishable from *Video Gaming*. Although the separation of powers principles articulated by the court of appeals in *Video Gaming* were correctly applied in light of the issue of the video poker statute's constitutionality in that case, these same principles are not equally applicable to a finding of substantial justification in this case, in which this Court declined to address the constitutionality of Act 153, but instead decided *Layman* solely on whether Act 153 constituted a breach of contract.[5] In other words, the State and the Retirement System in *Layman* were not defending the validity of an unconstitutional statute, but rather, were defending the validity of a statute that constituted a breach of contract. Accordingly, although separation of powers principles may substantially justify a state agency's defense of an unconstitutional statute, these same principles will not

[5] In fact, Act 153 as it applies to TERI participants joining the program after the Act's effective date is still the law in South Carolina.

substantially justify the State's and the Retirement System's defense of what we held to be an illegal act.

Instead, we find *Heath v. County of Aiken* to be instructive in this matter. 302 S.C. 178, 394 S.E.2d 709 (1990). In *Heath*, this Court determined in the underlying litigation that the local county council violated a state statute prohibiting county governing bodies from developing personnel polices and procedures for employees under the direction of an elected official. *Id.* at 181, 394 S.E.2d at 710. In reviewing whether county council was substantially justified in pressing its claim, this Court examined the "substance and outcome of the matter eventually litigated," and found that the statute construed in the underlying case was "unambiguous." *Id.* at 184, 394 S.E.2d at 712. The Court reasoned that when coupled with the relevant precedent, this clearly established that the County's claims did not have a reasonable basis in law or in fact. Accordingly, the Court held that an award of attorneys' fees was appropriate under the state action statute. *Id.*

Turning to the instant case, this Court held in *Layman* that the language in the TERI statute created an unambiguous contract between the State and TERI participants who entered the program prior to the enactment of Act 153, and that the State's unilateral alteration of this agreement by applying the requirements of Act 153 to this class of TERI participants constituted a breach of contract. 368 S.C. at 640, 630 S.E.2d at 270. In our view, the State's and the Retirement System's breach of an unambiguous contract with the TERI participants is analogous to the County's violation of an unambiguous statute in *Heath*. In other words, we find that the State and the Retirement System had no reasonable basis in law or in fact on which to defend the breach of an unambiguous contract with certain TERI participants. Accordingly, we hold that the State and the Retirement System were not substantially justified in pressing their claim, and therefore, the circuit judge correctly concluded that counsel for TERI plaintiffs were entitled to attorneys' fees under the state action statute. *See also McDowell*, 304 S.C. at 543, 405 S.E.2d at 833 (finding that in relying on an erroneous legal conclusion, "DSS's litigation position was not substantially justified because it had no reasonable basis in law and fact").

Although we hold that the State and the Retirement System were not substantially justified in pressing their claim in *Layman*, at the same time, we agree with the State's and the Retirement System's assertion that the circuit judge erred in his findings regarding substantial justification. Specifically, the circuit judge ruled that the State's failure to investigate the legality of Act 153 before its enactment and the subsequent passing of Act 153 into law had no reasonable basis in law or in fact. We find that the circuit judge's reasoning is flawed in several respects.

In deciding whether a state agency acted with substantial justification, courts must only determine whether the agency's position in litigating the case has a reasonable basis in law and in fact. *Id.* at 542, 405 S.E.2d at 832. For this reason, the factual circumstances surrounding the enactment of Act 153 are irrelevant in deciding whether substantial justification existed for the State's and the Retirement System's defense of Act 153's contractual validity in the underlying litigation. The circuit judge's finding that the State's enactment of Act 153 lacked substantial justification was not only completely unrelated to the relevant inquiry in this case, it also unnecessarily implicated separation of powers principles which recognize that the authority to carry out the legislative process rests exclusively with the legislature. Although a court may issue the final judgment with regard to the constitutionality or enforceability of a law currently in effect, there is no similar judicial authority for reviewing the basis for the legislature's enactment of a law in the first instance. *See Keyserling v. Beasley*, 322 S.C. 83, 86, 470 S.C. 100, 101 (1996) ("We do not sit as a super legislature to second guess the wisdom or folly of decisions of the General Assembly."). For these reasons, the actions of the General Assembly in passing Act 153 into law was an incorrect basis on which to find a lack of substantial justification.

The circuit judge's finding that the Retirement System should have challenged the enactment and enforcement of Act 153 is flawed for similar reasons. On this matter, the circuit judge grossly misstated the separation of powers doctrine as it operates in our system of government by reasoning that "our system of government is a triangle of checks and balances and does not require one branch to unwaveringly yield to the directive of another while it waits for the third branch to referee in the form of judicial determination." To

the contrary, our courts have clearly established that under separation of powers principles, executive agencies are obligated to comply with the General Assembly's enactment of a law until it has been otherwise declared invalid. *See, e.g., Video Gaming*, 358 S.C. at 652, 595 S.E.2d at 892. To imply that the Retirement System would have been substantially justified under the state action statute had it refused to enforce Act 153 infringes on the legislative authority and burdens executive agencies with the duty of making their own assessment of legislation while already harboring the responsibility of administering legislation. Under our system of government, state agencies are not saddled with such burdens, and therefore, this was an incorrect basis on which to find a lack of substantial justification.

Finally, the circuit judge reasoned that the continued enforcement of Act 153 had no reasonable basis in law or in fact once the *Layman* circuit court issued a temporary restraining order prohibiting the Retirement System from collecting further contributions from the named plaintiffs. We find that because the State and the Retirement System fully complied with the terms of the temporary restraining order (i.e., they stopped collecting further contributions from only the named plaintiffs), this was also an improper basis on which to make a finding of substantial justification.

For these reasons, we vacate the circuit judge's findings on the issue of substantial justification. The circuit judge's findings misinterpret the existing law and unnecessarily extend the inquiry beyond the issue of whether the State and the Retirement System were substantially justified in pressing their claim against the TERI plaintiffs. Clarifying the relevant inquiry in this matter, we hold that the State and the Retirement System were not substantially justified in breaching an unambiguous contract with certain TERI participants. Accordingly, we hold that the circuit judge did not err in his ultimate conclusion that counsel for the TERI plaintiffs are entitled to attorneys' fees under the state action statute.

II. Amount of attorneys' fees awarded

The remaining issue between the parties centers on the circuit judge's method of determining a "reasonable" fee to be awarded under the state

action statute. The State and the Retirement System argue that the circuit judge erred in basing an award of attorneys' fees on a percentage of the TERI participants' recovery because it resulted in an unreasonably high fee award. In turn, counsel for the TERI plaintiffs argue that the circuit judge correctly based the fee on a percentage of the TERI participants' recovery, but chose a percentage that resulted in an unreasonably low award of attorneys' fees. We agree with the State and the Retirement System that a calculation of attorneys' fees under the state action statute based on a percentage of the TERI participants' recovery is improper. We further agree that under the circumstances of this case, an award of attorneys' fees totaling $8.66 million is unreasonable.

A. Method of calculation

Under the "American Rule," the parties to a lawsuit generally bear the responsibility of paying their own attorneys' fees. *See Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 561 (1986). This Court and others recognize numerous exceptions to this rule, including the award of attorneys' fees pursuant to a statute. *See Jackson*, 326 S.C. at 307, 486 S.E.2d at 759. A statutory award of attorneys' fees is typically authorized under what is known as a fee-shifting statute, which permits a prevailing party to recover attorneys' fees from the losing party. *See Blum v. Stenson*, 465 U.S. 886, 893 (1984). Neither party disputes that the state action statute applicable here is such a fee-shifting statute. *See* S.C. Code Ann. § 15-77-300 (providing that a court "may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency").

Another exception to the American Rule recognized by this Court is the award of attorneys' fees pursuant to the common fund doctrine. The common fund doctrine allows a court in its equitable jurisdiction to award reasonable attorneys' fees to a party who, at his own expense, successfully maintains a suit for the creation, recovery, preservation, or increase of a common fund or common property. *Petition of Crum Johnson v. Williams*, 196 S.C. 528, 531, 14 S.E.2d 21, 23 (1941). Attorneys' fees awarded pursuant to the common fund doctrine come directly out of the common fund

created or preserved. *Id.* The justification for awarding attorneys' fees in this manner is based on the principle that "one who preserves or protects a common fund works for others as well as for himself, and the others so benefited should bear their just share of the expenses." *Id.* at 531-32, 14 S.E.2d at 23.

A key distinction between the award of fees authorized by statute and the award of fees from a common fund is that the equitable principles underlying the common fund doctrine create a mechanism in which attorneys' fees are not assessed against the losing party by *fee-shifting*, but rather, are taken directly from the common fund or recovery and borne by the prevailing party through *fee-spreading*. *See Burke v. Ariz. State Ret. Syst.*, 77 P.3d 444, 448 (Ariz. Ct. App. 2003) (emphasis in original). To reflect this distinction, courts generally hold that a "lodestar" approach reflecting the amount of attorney time reasonably expended on the litigation results in a reasonable fee under a fee-shifting statute. *See Blum*, 465 U.S. at 900 n.16 (comparing the bases for awarding a reasonable attorneys' fee under the common fund doctrine versus a federal fee-shifting statute). Conversely, when awarding fees to be paid from a common fund, courts often use the common fund itself as a measure of the litigation's "success." These courts consequently base an award of attorneys' fees on a percentage of the common fund created, known as the "percentage-of-the-recovery" approach. *See, e.g.*, *Edmonds v. United States*, 658 F. Supp. 1126, 1144 (D.S.C. 1987) (expressing a preference for a percentage-of-the-recovery method when awarding attorneys' fees from a common fund).[6] The circuit judge in the instant case utilized the percentage-of-the-recovery approach in awarding counsel for TERI plaintiffs $8.66 million in attorneys' fees under the state action statute.

[6] Meanwhile, a number of state courts have recently ruled that lower courts have discretion in deciding whether to calculate awards from a common fund using a percentage-of-the-recovery approach or the lodestar method. *See City of Birmingham v. Horn*, 810 So. 2d 667 (Ala. 2001); *Chun v. Bd. of Trs. of the Employees' Ret. Syst. of the State of Haw.*, 992 P.2d 127 (Haw. 2000).

Counsel for TERI plaintiffs argue that this Court's instructions to consider the "benefit to all old TERI participants" in awarding attorneys' fees make the determination of a reasonable award in this case analogous to cases in which attorneys' fees are awarded from a common fund. Therefore, even though the state action statute shifts the source of attorneys' fees to the State, counsel nevertheless urges this Court to find that the circuit judge properly awarded attorneys' fees based on the percentage-of-the-recovery approach typically utilized when the source of attorneys' fees is spread among the beneficiaries of a common fund. We disagree.

In our view, utilizing common fund methodology when awarding attorneys' fees pursuant to a fee-shifting statute is wholly inappropriate in light of the underlying theoretical distinction between a common fund source of attorneys' fees and a statutory source of attorneys' fees. Although both sources are exceptions to the general rule that each party is responsible for the party's own attorneys' fees, the common fund doctrine is based on the equitable allocation of attorneys' fees among a benefited group, and not the shifting of the attorneys' fee burden to the losing party. This Court certainly acknowledges that a percentage-of-the-recovery approach may be appropriate under circumstances in which a court is given jurisdiction over a common fund from which it must allocate attorneys' fees among a benefited group of litigants. However, where, as here, a fee-shifting statute shifts the source of reasonable attorneys' fees entirely to the losing party, we find it both illogical and erroneous to calculate fees using the methodology justified under a fee-spreading theory. *See Burke*, 77 P.3d 444 (vacating a trial court's award of $9.6 million in attorneys' fees based on a percentage of the recovery because a settlement agreement in which the state retirement system agreed to pay reasonable attorneys' fees established a fee-shifting as opposed to a fee-spreading scenario).

Furthermore, we note that an award based on a percentage of the TERI plaintiffs' recovery is inconsistent with the express terms of the statutory scheme. Although the state action statute neither requires that attorneys' fees be awarded based on an hourly rate, nor places a numerical cap on attorneys' fees, we find it significant that the statute provides that attorneys' fees assessed to the state agency may only be paid "upon presentation of an

itemized accounting of the attorney's fees." S.C. Code Ann. § 15-77-330 (2005). In our opinion, the requirement of an "itemized accounting" squarely contradicts the utilization of the percentage-of-the-recovery method in awarding attorneys' fees under the statute.

We additionally distinguish the instant case from *Ex parte Condon*, 354 S.C. 634, 583 S.E.2d 430 (2003), in which this Court approved a circuit court's award of attorneys' fees based on a percentage of the recovery in a class action case against the State and the South Carolina Department of Revenue on behalf of citizens 85 and older who failed to receive the one percent sales tax exemption provided for by law. In *Condon*, the parties reached a settlement agreement which stipulated that the circuit court would calculate and award attorneys' fees to be paid by the State to the prevailing plaintiff class. Although the agreement established a fee-shifting scenario in this regard, the guidelines for determining attorneys' fees set forth in the parties' agreement clearly contemplated an award based on a percentage of the common fund recovered. *Id.* at 636-37, 583 S.E.2d at 431. In contrast, the state action statute authorizing attorneys' fees in this case in no way suggests that attorneys' fees should be calculated based on a percentage of the common fund recovered. Moreover, the Court in this case specifically rejected counsel for TERI plaintiffs' petition for an award of fees under the common fund doctrine, specifying that "attorney's fees in this matter should not come from the retirement contributions made by the old TERI participants." *Layman v. State*, S.C. Sup. Ct. Order dated June 1, 2006 (Shearouse Adv. Sh. No. 21 at 18).

Accordingly, we hold that because the state action statute shifts the source of the prevailing party's attorneys' fees to the losing party, an award of fees based on a percentage of the prevailing party's recovery is improper. Therefore, the circuit judge erred in calculating attorneys' fees in this manner.

B. "Reasonable" attorneys' fees under the state action statute

1. Reasonableness of the circuit judge's award

Our analysis does not end with a determination of the proper method for calculating attorneys' fees, however. Regardless of any theoretical preference for one method of fee calculation over another, the overriding benchmark for awards of attorneys' fees under both the state action statute and the general premise of the common fund doctrine is that attorneys' fees must be "reasonable." *See Del. Valley Citizens' Council*, 478 U.S. at 562. In light of the circumstances of this case, we hold that an award of $8.66 million in attorneys' fees is entirely unreasonable.

From its inception in our original jurisdiction, this Court repeatedly took actions which served to narrow the focus of this litigation and minimize the associated costs to all involved. In the order granting original jurisdiction, the Court required that all contributions made by old TERI participants pursuant to Act 153 must be deposited by the Retirement System into an interest-bearing escrow account until the Court rendered a final decision. This prophylactic decree, made on the Court's own motion, acted to preserve the funds at issue with no further legal action necessary by either party.

The Court's order expanded the scope of this mandate for efficiency to the sequencing and substance of the case. With no further discovery permitted, the Court instructed the parties to agree on the matters to be included in the appendix within ten days of the order granting original jurisdiction and set forth specific guidelines as to the exact materials to be submitted to the Court by each party thereafter.[7] The Court limited these materials to the parties' final briefs and the appendix, and specified that the

[7] The Court also specified that if the parties could not agree, all matters designated by both parties would be included in the appendix without prejudice to the right of the TERI plaintiffs to move for costs pursuant to Rule 222(c), SCACR, for printing irrelevant matter.

parties would be notified "if the Court finds that oral argument is necessary to resolve the issues in this matter." The Court also provided a specific timeline for submission of materials along with the admonition that "[n]o continuances or extensions will be granted absent extraordinary circumstances." Pursuant to this timeline, the entire process of collecting and submitting the necessary documents was to be completed within a maximum of eighty days from the Court's order. Finally, noting the named TERI participants' motion for class certification in the trial court, this Court ordered that the motion be re-filed in the Court within five days of the order.

Even after the final judgment in *Layman*, this Court's actions were aimed at serving the parties' fiscal interests. When the State and the Retirement System informed the Court that their records contained all of the information necessary to effectuate the return of contributions – already held in escrow pursuant to the earlier Court order – to all of the TERI participants subject to the Court's ruling, the Court decertified the class of TERI plaintiffs. Because the relief granted to the named plaintiffs applied to each and every TERI participant in the defined class, the Court determined that the Retirement System's assurances that it would fully comply with the Court's order for relief made the time-consuming and costly formality of class notice unnecessary. Moreover, the Court rejected counsel's request for attorneys' fees to be paid out of the common fund so that the TERI participants would not ultimately bear the costs of litigation associated with enforcing their contract rights with the government.

Counsel for the TERI plaintiffs claim that their efficient and expeditious efforts fully justify an $8.66 million award of attorneys' fees. Counsel claims that their good lawyering not only resulted in 100% recovery for the TERI participants, but ultimately saved tens of thousands of dollars in attorneys' fees due to the quick result obtained in the case. Although counsel's efforts were certainly commendable, counsel is not entitled to sole credit for the overall efficiency of the case when it was also counsel's compliance with this Court's instructions that yielded this judicious result.

Viewing the circuit judge's award of attorneys' fees in light of the state action statute's limitation that attorneys' fees assessed to a state agency may

only be paid "upon presentation of an itemized accounting of the attorney's fees," S.C. Code Ann. § 15-77-330, the circuit judge's $8.66 million award results in an hourly rate of $6,000 for each attorney and staff member involved in the litigation of the case on behalf of the TERI participants. We find this fee inconsistent with this Court's careful crafting of both the procedural and substantive path of this case aimed at minimizing costs for all involved. Accordingly, we hold that under the circumstances of this case, the circuit judge's award of $8.66 million in attorneys' fees pursuant to the state action statute was unreasonable.

2. Calculation of reasonable attorneys' fees

We turn next to the method of calculating attorneys' fees in this case, and hold that a lodestar analysis is the proper method for determining an award of "reasonable" attorneys' fees under the state action statute. A lodestar figure is designed to reflect the reasonable time and effort involved in litigating a case, and is calculated by multiplying a reasonable hourly rate by the reasonable time expended. *See Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 652 (4th Cir. 2002). Using this as a starting point for reasonableness, a court may consider other factors justifying an enhancement of the lodestar figure with a "multiplier" before arriving at a final amount. *See Edmonds*, 658 F. Supp. at 1148. In our opinion, the lodestar method is particularly appropriate in this case because it equally embraces the theory of fee-shifting embodied in the state action statute, as well as the notion of efficiency established by the Court in the underlying litigation. Accordingly, we proceed with a lodestar analysis in order to determine reasonable attorneys' fees in this case. *See also Del. Valley Citizens' Council*, 478 U.S. at 565 (noting the strong presumption that the lodestar approach is the most accurate determination of reasonable attorneys' fees in light of the intended purpose of the usual fee-shifting statute); *Burke*, 77 P.3d 444 (finding the lodestar calculation to be the appropriate method of awarding reasonable attorneys' fees where a settlement agreement established a fee-shifting as opposed to a fee-spreading scenario).

In determining the reasonable time expended and a reasonable hourly rate for purposes of calculating attorneys' fees, South Carolina courts have

historically relied on six common law factors of reasonableness: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the beneficial results obtained; and (6) the customary legal fees for similar services. *See Jackson*, 326 S.C. at 308, 486 S.E.2d at 760. In order to address the exceptional circumstances of this case, this Court instructed the circuit judge in the *Layman* remand order to give enhanced consideration to three of these factors in determining an award of reasonable attorneys' fees: specifically, "the actual amount of work performed, expenses incurred, and the benefit obtained for all of the old TERI participants." *Layman v. State*, S.C. Sup. Ct. Order dated June 1, 2006 (Shearouse Adv. Sh. No. 21 at 18). In emphasizing these criteria, this Court intended to remain consistent with the theoretical guidelines for awarding fees pursuant to a fee-shifting statute, while addressing the equitable implications in awarding statutory attorneys' fees to counsel who, over a relatively brief period of time, successfully litigated a claim that yielded 100% recovery for the entire class of TERI plaintiffs. We reiterate that it was error for the circuit judge to read so far into these equity-based specifications to the point of awarding attorneys' fees based on a method commonly associated with an equitable theory (i.e., fee-spreading) that was not in play in this case.

a. Lodestar calculation of attorneys' fees

Beginning with an analysis based on the common law factors of reasonableness, we proceed with a lodestar calculation of reasonable attorneys' fees using the hourly rate quotes and time sheets submitted by counsel for TERI plaintiffs. Because neither party disputes that the hourly rates submitted by counsel for the TERI plaintiffs are reasonable given the professional standing of counsel and the nature of the case, the chart below reflects this Court's determination that counsel for TERI plaintiffs' current rates constitute a reasonable hourly rate for purposes of a lodestar calculation. *See Liberty Mut. Ins. Co. v. Emp. Res. Mgmt., Inc.*, 176 F. Supp. 2d 510 (D.S.C. 2001) (explaining that a reasonable hourly rate is determined by comparing the rates of the prevailing party's attorneys to the prevailing market rates in the community for similar services by lawyers of comparable

standing). In order to reflect his role as lead counsel in class action litigation, the lodestar analysis uses Mr. Lewis's premium hourly rate which he typically reserves for "difficult" cases.

Turning next to the reasonable time spent on the litigation, we first consider that the time sheets submitted by counsel for TERI plaintiffs include all of the hours spent on the litigation of the case (designated in the chart below as "Total Hours Expended"), with no distinction between time associated with the TERI participants' claims giving rise to the instant case, and time associated with the Working Retirees' claims, which were remanded. Although the record indicates that Working Retirees constituted roughly one-third of the class of plaintiffs in *Layman*, we do not find it necessary to adjust the total hours expended by this proportion in order to arrive at a reasonable fee in this case. Not only were the same legal theories advanced on behalf of both the TERI participants and the Working Retirees, making their claims virtually indistinguishable, but more importantly, guiding jurisprudence explicitly holds that "a party need not be successful as to all issues in order to be found to be a prevailing party" for purposes of awarding attorneys' fees under the state action statute.[8] *Heath*, 302 S.C. at 182, 394 S.E.2d at 711. Only in an abundance of caution, however, do we reduce the number of total hours expended by three percent (3%), rounded down to the nearest tenth, in order to account for any time devoted solely to the Working Retirees' claims, thereby arriving at what we view as a "reasonable" number of hours expended on the TERI participants' claims (appearing as "Net Hours Expended" in the chart below). *See Edmonds*, 658 F. Supp. at 1135 n.18, 1147 n.44 (performing a lodestar analysis and adjusting the time devoted to litigating the underlying case by two to three percent in order to account for the fact that "some hours may not be properly compensable").

[8] In fact, we cannot characterize the Working Retirees' claims as unsuccessful at this point, as these claims have simply been remanded for further consideration.

Based on the foregoing, the Court calculates the lodestar fee in this case as follows:

	Total Hours Expended	Net Hours Expended	Hourly Rate	Totals
Lewis & Babcock				
A. Camden Lewis	139.5	135.3	$600.00	$81,180.00
Keith M. Babcock	224.8	218.0	$350.00	$76,300.00
Ariail E. King	109.7	106.4	$225.00	$23,940.00
Peter D. Protopapas	14.6	14.1	$250.00	$3,525.00
William A. McKinnon	262.1	254.2	$225.00	$57,195.00
Brady R. Thomas	25.2	24.4	$200.00	$4,880.00
Paralegals	271.3	263.1	$80.00	$21,048.00
Law Clerks	144.2	139.8	$70.00	$9,786.00
Richard A. Harpootlian, P.A.				
Richard A. Harpootlian	97.5	94.5	$500.00	$47,250.00
David Scott	96.8	93.8	$250.00	$23,450.00
Heather Herron	44.6	43.2	$80.00	$3,456.00
Holli Langenburg	5.1	4.9	$80.00	$392.00
TOTAL				$352,402.00

b. Enhancement of the lodestar fee with a multiplier

Using the lodestar calculation of $352,402.00 as a starting point for a reasonable fee in this case, we further conclude that enhancing the lodestar figure through a multiplier is necessary to reflect the exceptional circumstances of this case as emphasized by the Court in the remand order. *See Blum*, 465 U.S. at 897 (recognizing that an enhanced lodestar award may be justified "in some cases of exceptional success" (quoting *Hensley v. Eckerhart*, 461 U.S. 424 (1983))). More specifically, we find that the expedited litigation timeline imposed by the Court, the wholly successful recovery for the entire class of TERI participants, the extraordinary sum of

money returned to the TERI participants and ultimately saved by the TERI participants, and the termination of governmental acts constituting a breach of contract are exceptional circumstances which justify the use of a multiplier. Accordingly, we apply a multiplier of 1.25 to the lodestar calculation in order to arrive at a reasonable fee that adequately compensates counsel for the TERI plaintiffs.[9] To this total, we add the expenses incurred by counsel for the TERI plaintiffs, which this Court directed the circuit judge to include in the award of attorneys' fees, even though the state action statute does not mandate such reimbursement.[10] *See also Hyatt v. Apfel*, 195 F.3d 188, 192 (4th Cir. 1999) (affirming a multiplier of 1.333 applied to a lodestar calculation of attorneys' fees to be paid by the defendant government entity on account of the "exceptional results" obtained by plaintiffs' counsel); *Edmonds*, 658 F. Supp. at 1148 (applying a multiplier of 1.15 to 1.25 to the lodestar fees for the plaintiffs' various attorneys to account for the

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[9] The award of reasonable attorneys' fees under the state action statute is in the Court's discretion and there are numerous ways for the Court to arrive at this reasonable fee when applying a multiplier. In choosing the multiplier to be applied in the instant case, we find the following observation instructive.

> Unless the court knows beforehand precisely what this reasonable value should be, the selection of an appropriate multiplier must follow essentially a trial and error course. If the use of one multiplier over another results in what the court feels is an unreasonably high or low fee, then the multiplier must be adjusted to comport with the court's perception of the proper fee award under the circumstances.

In re Chicken Antitrust Litigation, 560 F. Supp. 963, 995 (N.D. Ga. 1980); *see also Edmonds*, 658 F. Supp. at 1149.

[10] Any attempt to characterize the expenses incurred as being related to the TERI participants' claims or the Working Retirees' claims would, in our opinion, be an exercise in futility. Because of the unified nature of these claims, and because the expenses incurred are relatively insignificant, we include them in their entirety in the calculation of reasonable attorneys' fees.

"exceptional circumstances" surrounding the amount of money involved and the results obtained in the case).

Adjusting the lodestar calculation to reflect the exceptional circumstances of this case emphasized by this Court in the remand order, we calculate a reasonable attorneys' fee as follows:

Lodestar base calculation	$352,402.00
Multiplier	x 1.25
Subtotal	$440,502.50
Add expenses incurred	+ 4,724.10
TOTAL ENHANCED LODESTAR	**$445,226.60**

Accordingly, we hold that an enhanced lodestar figure equaling $445,226.60 constitutes a reasonable award of attorneys' fees to counsel for TERI plaintiffs under the state action statute.

C. Summary of attorneys' fee calculation

The following summarizes our resolution of this appeal arising from the Court's remand of *Layman* to the circuit judge for a determination of reasonable attorneys' fees. We hold that the circuit judge's award of attorneys' fees using the percentage-of-the-recovery method was improper and resulted in an award that was unreasonable under the state action statute. We therefore vacate the award of $8.66 million to counsel for TERI plaintiffs and further hold that a reasonable award of attorneys' fees in this case is properly calculated using the lodestar method, enhanced by a multiplier and the addition of counsel's expenses to reflect "the actual amount of work performed, expenses incurred, and the benefit obtained for all of the old TERI participants." Based on a calculation representative of this conclusion, we assess reasonable attorneys' fees in the amount of $445,226.60 against the State and the Retirement System.

CONCLUSION

For the foregoing reasons, we affirm the circuit judge's award of attorneys' fees under the state action statute, but modify the court's award of fees using a lodestar calculation and an appropriate multiplier.

MOORE, BEATTY, JJ., and Acting Justices E. C. Burnett, III and Thomas W. Cooper, Jr., concur.

The Supreme Court of South Carolina

In the Matter of C. H. Barrier, Respondent.

ORDER

Respondent was suspended on November 19, 2007, for a period of sixty (60) days. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

s/ Daniel E. Shearouse
Clerk

Columbia, South Carolina

January 22, 2008